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A New American Dilemma?: U.S. Constitutionalism vs. International Human Rights

STANLEY N. KATZ*

*"Americans don't see it this way, but the country with the most puzzling human rights record in the world is their own."*¹

My objective is to explore the historical reasons that serious and well-intentioned Americans disagree so profoundly on what human rights are, and what the role of my country might be in enforcing the emerging international law of human rights. I am not so interested in the political and social reasons for American hesitance to embrace the international law of human rights — temerity, isolationism, arrogance, imperialism, mean-spiritedness and more — as I am in the underlying elements of our constitutional history and structure that have made it so hard for our nation "to do the right thing" by way of constitutional human rights, even for those of us favorably inclined to do so.

1. THE MULTILATERAL TREATY SYSTEM

The 1787 Constitution does not say much about international law. The most obvious reference is the delegation to Congress of the power to "define and punish . . . Offenses against the Law of Nations,"² but until recently this was restricted to its textual pairing with the power to "define and punish Piracies and Felonies committed on the high Seas."³ The normal method for committing the United States to international norms has, of course, been by the formal adoption of treaties and covenants. The President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."⁴ This is a potentially sweeping power, for it is amplified by Article VI, Section 2, which says that treaties made "under the Authority of the United States," like the Constitution and statutes made

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1. Michael Ignatieff, *No Exceptions?*, 1:1 LEGAL AFF. 59 (2002).

2. U.S. CONST. art I, § 8.

3. U.S. CONST. art. I, § 8, cl. 10.

4. U.S. CONST. art. II, § 2, cl. 2.

in accordance with it, "shall be the supreme Law of the Land."⁵

Are there any limits on the treaty-making power? Hurst Hannum notes that:

It is well-established that a self-executing treaty (or a non-self-executing treaty implemented by Congress) supersedes all inconsistent state and prior laws, as well as prior inconsistent federal statutes. Although the subject matter of treaties is in theory limited "to all proper subjects of negotiation between our government and the governments of other nations," neither this oft-quoted phrase nor subsequent cases suggest any practical limitations on the matters which the President and Senate may appropriately address by treaty. The only clear exceptions to this power are those acts which are specifically reserved in the Constitution to Congress or the President, e.g., the power to tax or to declare war, and which could not be accomplished by treaty.⁶

The most effective limitation on the applicability of international human rights treaties has been the doctrine that multilateral human rights treaties are non-self-executing, and thus not directly enforceable. Although there is no U.S. Supreme Court case on point, both state and federal courts have followed the doctrine of the California Supreme Court in *Sei Fujii v. State*,⁷ which held that human rights covenants of the United Nations are not self-executing.⁸ Of course, as Hannum also notes, "[t]he self-executing versus non-self-executing distinction is perhaps less relevant than it might appear, given the poor record of U.S. ratification of international human rights treaties."⁹ We certainly cannot execute treaties we do not ratify, or human rights treaties that we emasculate with "reservations, understandings and declarations."

Let us not forget that the stakes are high. Paul Lauren makes the point that the entire notion of the law of nations was profoundly transformed in the decades after the promulgation of the Universal Declaration of Human Rights.

Under traditional and heavily entrenched international law, only states possessed legal standing and enjoyed recognized rights. This horizontal system between sovereign states ruled supreme, and individuals remained outside. But with the advent of this whole body of legal instruments in the form of binding covenants and conventions with monitoring bodies, this system has increasingly changed into a more vertical arrangement, whereby individual men, women and chil-

5. U.S. CONST. art. VI, § 2.

6. HURST HANNUM, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW 3 (1985).

7. 242 P.2d 617 (Cal. 1952).

8. *Id.*

9. HANNUM, *supra* note 6, at 6-7.

dren find themselves being increasingly transformed into legitimate subjects of international law to be legally respected, and entitled to the protection of their rights against violations by their own governments, as well as by other states.¹⁰

Thus the currently emerging human rights regime not only threatens state sovereignty, but also promises to empower citizens of laggard states both to imagine and seek recognition of rights not protected at home. As I will argue later, this is a peculiarly unwelcome notion in the United States, whether we are “laggard” or not.

In fact, the specter of the enforcement of foreign rights norms for our citizens has haunted some Americans throughout most of our national history. We were, after all, among the last of the “civilized” nations to join the international movement to abandon the system of human bondage. Even as late as the negotiations to create the League of Nations, President Wilson fought the efforts of the Japanese and others to introduce a clause into the League Charter declaring a right to racial equality. However, to be fair, it might have been because Wilson knew the Senate would never ratify the League Treaty if such a clause were included. Senator James Reed of Missouri, during the debate about U.S. entrance into the League, blurted out, “Think of submitting questions involving the very life of the United States to a tribunal on which a nigger from Liberia, a nigger from Honduras, a nigger from India . . . each have votes equal to that of the great United States.”¹¹ Or, more diplomatically, Senator Henry Cabot Lodge of Massachusetts declared, “We do not want a narrow alley of escape from jurisdiction of the League. We want to prevent any jurisdiction whatever.”¹² But I do not want to put too much emphasis on the World War I experience. I want instead to concentrate on the history of human rights since the Second World War, and briefly review how far they have come since then, and what progress they have made and failed to make in this country.

As the West caught its first glimpses of the horrors of Nazism, it seemed clear that a conscientious response to totalitarianism required the energetic defense of the rights to liberty and security that had been so thoroughly violated during the first four decades of the twentieth century. As early as 1941, Franklin Roosevelt had called for a world “formed upon four essential freedoms;”¹³ and shortly after America entered the war, the Allies made human rights an explicit goal of the war, declaring “complete victory over their enemies [essential] to pre-

10. PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 260 (1998).

11. *Id.* at 125.

12. *Id.*

13. 87 CONG. REC. 1 (daily ed. Jan. 6, 1941) (speech to Congress by Franklin D. Roosevelt).

serve human rights and justice in their own lands as well as in other lands.”¹⁴

The idea of international human rights first surfaced in the United States at the American Law Institute, the country’s most prestigious national legal association. In 1942, the ALI appointed a committee of lawyers and political scientists to examine the world’s cultures in order to compile a tentative international bill of rights. The committee reported to the ALI governing body in 1944, but the Council decided against further attempts to draft an international bill of rights. The Council explained its refusal by noting that the representatives from different nations did not agree on the rights to be included and, significantly, by the recognition that “the imposition of positive duties upon the state to enforce the rights will be questioned.”¹⁵ Probably more important, the Director of the ALI noted that further discussion of the international bill of rights “might and possibly would draw us into what could not but be regarded as a political discussion, something which it is imperative that we do not do.”¹⁶

Nevertheless, when the United States, the Soviet Union, Great Britain and China met at Dumbarton Oaks in late 1944 to negotiate the charter of an international organization to replace the League of Nations, their enthusiasm for human rights was already waning, and all except China — tragically ironic, given the country’s subsequent record — were united in opposition to any meaningful human rights provisions. The Senate had already resolved that the United States’ membership in any such international organization should be conditioned on a strong domestic jurisdiction clause. It is no surprise, then, that the official briefing that our delegates took to the San Francisco Peace Conference contained not a single agenda item related to human rights.

The Charter of the United Nations signed by forty-four nations at San Francisco in 1945 took greater account of human rights than the United States, the Soviet Union and Great Britain had intended. But, it was the vocal support for human rights by America’s own civil society — several U.S. non-governmental organizations were shortsightedly invited to the San Francisco Conference as consultants by the U.S. Department of State — that forced it to take the lead in giving human rights their prominent place in the U.N. Charter.¹⁷ Prominent, but still not enforceable. National sovereignty and domestic jurisdiction contin-

14. GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 23 (New Press 2000) (1999).

15. Proceedings of 1944 ALI Annual Meeting, 21 A.L.I. PROC. 33 (1944).

16. *Id.*

17. See ROBERTSON, *supra* note 14, at 24.

ued to stand in the way of enforceability. And so emerged Article 2(7) of the Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matter to settlement."¹⁸

American ambivalence toward human rights continued even as Eleanor Roosevelt was chosen as chairperson of the preparatory committee established to draft recommendations for the U.N.'s Commission on Human Rights, and as she was then unanimously elected chair of the Commission itself. Enforceability continued to be a sticking point for the United States. In 1947, as her Commission deliberated about an international bill of rights, Roosevelt received instructions from our government that these deliberations should lead to no more than a declaration of principles, and that any discussions about mechanisms for enforcement "should be kept on a tentative level and should not involve any commitments by this Government."¹⁹ Thus it was that the product that emerged in December 1948 was the Universal *Declaration* of Human Rights and not a binding convention. Nevertheless, as Geoffrey Robertson has noted, the Declaration was "an imperishable statement that has inspired more than 200 international treaties, conventions and declarations, and the bills of rights found in almost every national constitution adopted since the war."²⁰

Although the Universal Declaration of Human Rights was non-binding, Article 28 did decree that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."²¹ So in 1948, the U.N. General Assembly set the Commission on Human Rights to work drafting a treaty that would require the domestic law of ratifying states to guarantee the human rights of their citizens. Yet in 1953, Eleanor Roosevelt was recalled from the Commission on Human Rights although she still had two years of her term remaining. Secretary of State John Foster Dulles announced that the United States would not become a party to any U.N. human rights treaty. Perhaps we should not be surprised by this turn of events. The practical reasons for joining the United Nations, combined with the efflorescence of democratic ideals following World War II, had helped the proponents of ratification of the U.N. Charter avoid the disaster of the League experience. But the internationalist enthusiasm of the postwar period soon gave way to the historic fear of

18. U.N. CHARTER art. 2, para. 7.

19. LAUREN, *supra* note 10, at 232.

20. ROBERTSON, *supra* note 14, at 29.

21. U.N. CHARTER art. 28.

foreign entanglements with the onset of McCarthyism and a resurgence of neo-isolationism in the 1950s.

This reaction was most overtly expressed in the efforts of Ohio Senator John Bricker and other isolationist Midwestern senators to introduce what came to be known as the Bricker Amendment in 1953. The three sections of his proposed amendment were a straightforward attempt to enable Congress to prevent the use of treaties to override the Constitution and statutory law:

Sec. 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

Sec. 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.

Sec. 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.²²

Beyond simple constitutional conservatism, Bricker was especially antagonistic toward the draft U.N. covenants on human rights. He "characterized the covenant as 'a Covenant on Human Slavery,' a legalization of 'the most vicious restrictions of dictators,' a 'legal basis for the most repressive measures of atheistic tyranny,' 'an attempt to repeal the Bill of Rights,' a threat to freedom of religion and 'a blueprint for tyranny.'"²³ For Bricker, the Amendment was necessitated by the pressures of the Cold War:

The Communist drive for world domination, although a divisive influence in one sense, inspires the non-Communist world to seek increased safety in collective security arrangements, economic as well as military in character. All these influences have led in turn to proposals to curb the power of the nation-state by subordinating it to some measure of control by supra-national organizations.²⁴

Although the administration saw the Amendment primarily as an attack on the constitutional foreign policy powers of the President, for Bricker there was something much larger at stake:

What this amendment would in essence do is to keep the rights of the American people in the spiritual realm and not place them in the temporal power of an international government which is controlled by countries which are totalitarian in their philosophy and seem to have

22. John W. Bricker, *Making Treaties and Other International Agreements*, 289 ANNALS AM. ACAD. POL. & SOC. SCI. 136-37 (1953).

23. Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 318 (1988).

24. Bricker, *supra* note 22, at 134.

no concept of the God-given inalienable rights that the people of America enjoy.²⁵

Or, more to my point, as Paul Lauren explains:

Bricker decided to introduce legislation demanding that the United States withdraw from all covenants, conventions and treaties emerging from the United Nations having anything to do with human rights. "My purpose in offering this resolution," he declared to his colleagues, "is to bury the so called covenant on human rights so deep that no one holding office will ever dare to attempt its resurrection." He went on to describe the proposed covenant as "completely foreign to American law and tradition" and described it as nothing less than a "U.N. Blueprint for Tyranny." Then, on the floor of the Senate itself Bricker stridently announced to his colleagues: "I do not want any of the international groups, and especially the group headed by Mrs. Eleanor Roosevelt, which has drafted the covenant of Human Rights, to betray the fundamental, inalienable, and God-given rights of American citizens enjoyed under the Constitution. That is really what I am driving at."²⁶

I do not want to exaggerate the importance of the Bricker idea. The proposed amendment never made it out of the Senate. Most of its supporters were among the minority who supported Senator Joseph McCarthy against censure, and they represented a small, extremely conservative, isolated and isolationist minority in the Eisenhower Republican Party. President Eisenhower himself said in January 1954, "I am unalterably opposed to the Bricker Amendment. . . . Adoption . . . in its present form would be notice to our friends as well as our enemies abroad that our country intends to withdraw from its leadership in world affairs. The inevitable reaction would be of major proportions."²⁷ On the other hand, Dulles announced that the Eisenhower administration would not submit the two U.N. treaties on human rights to the Senate as such treaties "should, or lawfully can, be used as devices to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern."²⁸ My point is simply that Bricker, who couched his opposition in constitutional terms, touched a deep nerve in the historic American attitude toward U.S. participation in the international human rights movement through the treaty mechanism. In retrospect, his position seems quite weak constitutionally, since he sought an amendment out of fear that the existing constitutional struc-

25. Kaufman & Whiteman, *supra* note 23, at 316.

26. LAUREN, *supra* note 10, at 246 (internal citations omitted).

27. See Stephen A. Garrett, *Foreign Policy and the American Constitution: The Bricker Amendment in Contemporary Perspective*, 16 INT'L STUDIES Q. 187, 198 (1972).

28. *Id.* at 202.

ture did not provide a sufficient barrier against norm-creation by treaty. But the Bricker episode reveals an underlying sensitivity in our constitutional tradition with respect to human rights.

The United States, on the whole, remained aloof from U.N. human rights treaties for several decades. We played almost no role in the formulation of either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, which, along with the Universal Declaration, constitute the International Bill of Rights. We also stayed well away from these documents when they were opened for signature in 1966. We refused to ratify the Convention on the Prevention and Punishment of the Crime of Genocide, which has been open for signature since 1948. There were some minor exceptions. The United States did participate fairly actively in the U.N. Subcommission on Discrimination that produced the International Convention on the Elimination of All Forms of Racial Discrimination in 1965,²⁹ and acceded to the Convention on the Political Rights of Women in 1976 (although given that women already enjoyed the right to vote in the United States, this did not mean much).

Real engagement with the growing body of treaties had to wait until the late 1970s. President Carter signed the Civil Covenant in 1977, and sent it on to the Senate for ratification the following year, along with three other human rights treaties with a series of crippling reservations. In his letter of transmittal, Carter wrote, "the great majority of the substantive provisions of these four treaties are entirely consistent with the letter and spirit of the United States Constitution and laws."³⁰ The Senate Foreign Relations Committee held three days of hearings on these treaties in 1979, but reached no conclusion and did not report favorably on any of the treaties. Then, events intervened to stymie further progress. The Soviet invasion of Afghanistan and the Iran hostage crisis prevented final consideration of the treaties before President Reagan took office in 1981. The new administration displayed no interest in ratifying the Civil Covenant, and instead chose to focus on ratifying the Genocide Convention, which had been before the Senate since President Truman transmitted it almost forty years earlier. The ratification of the Genocide Convention occurred in 1988 with the attachment of an encompassing reservation by the United States "[t]hat nothing in the Convention requires or authorizes legislation or other action by the

29. Clyde Ferguson, *International Convention on the Elimination of All Forms of Racial Discrimination*, in *U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATION*, 41-42 (Richard B. Lillich ed., 1981).

30. Christina Cerna, *The United States and the American Convention on Human Rights: Prospects and Problems of Ratification*, in *THE UNITED STATES AND HUMAN RIGHTS: LOOKING INWARD AND OUTWARD* 96 (David P. Forsythe ed., 2000).

United States of America prohibited by the Constitution of the United States as interpreted by the United States.”³¹

In August 1991, President George H.W. Bush urged the Committee to reconsider the Civil Covenant, which it did in November. After a unanimous vote the following March, the Commission favorably reported the treaty to the full Senate for formal approval, which was granted in April 1992, along with the customary package of reservations, understandings and declarations. October 1994 was, however, a good month for the U.N. treaties in the United States. That month saw the ratification of two further treaties — the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Reagan administration had laid much of the groundwork for this ratification) and the International Covenant on Elimination of all Forms of Racial Discrimination. As usual, reservations, understandings and declarations (thirteen in all) accompanied both. But other important human rights treaties, such as the Economic Covenant and the Convention on the Rights of the Child, remain unratified by the United States. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families remains *unsigned* by the United States. On July 31, 2002, the U.S. Senate Foreign Relations Committee approved the Convention on the Elimination of All Forms of Discrimination Against Women, but the full Senate (having passed to Republican control) has yet to act. The current Bush administration opposes ratification of this Convention, and has prepared a package of reservations, understandings and declarations (RUDs) in the event the Convention is passed. The result is that the United States participates in the U.N. treaty/covenant human rights regime in a partial, inconsistent and ambivalent fashion, and that such international documents do not constitute rules of law for American courts charged with protecting similar individual and group rights domestically.

Even when the United States does ratify a human rights treaty, the standard is to have RUDs accompany the treaty. However, opinions about the significance of RUDs are mixed. Some commentators argue that it is only by means of RUDs that the problems that human rights treaties pose for the U.S. constitutional system can be met. Curtis A. Bradley and Jack L. Goldsmith, for instance, identify three sorts of challenges: (1) challenges of substance — tensions between treaty provisions and U.S. constitutional rights or democratically popular practices; (2) challenges of scope — the reach of treaties into civil, political and

31. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (ratified by the United States of America with reservations Nov. 25, 1988) (available at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booi/iv_booi/iv_1.html).

cultural life and the openness of their language means that if they were treated as law "they would generate significant litigation and uncertainty regarding the application and validity of numerous domestic laws;" and (3) challenges of structure — the United States' constitutional practice is that the House of Representatives initiates the kind of law contained in human rights treaties, and federalist principles suggest that "some matters should be regulated by state, rather than federal, officials."³² But RUDs, in Bradley and Goldsmith's opinion, successfully address each of these challenges.³³ With regard to the first, RUDs allow treaty-makers to avoid binding the United States to certain treaty provisions; declarations of non-self-execution and federalism understandings handle the scope and structure challenges by ensuring that treaties have legal effect only when implemented by legislation and that some provisions may be implemented by state and local governments rather than by the federal government.³⁴ Bradley and Goldsmith maintain that RUDs have been a part of the U.S. treaty-making process since the founding and that the Supreme Court has on several occasions referred positively to the power of conditional assent. Finally, they argue, "genuine and significant progress towards involvement in the international human rights system" that the United States has made would not have taken place "without the RUDs as a condition for U.S. ratification."³⁵

Other commentators, however, are less charitable toward RUDs. Louis Henkin, for example, criticizes them on several counts. While he concedes that treaties are subject to constitutional limitations and that reservations that "avoid an obligation that the United States could not carry out because of constitutional limitations" are appropriate, he claims that reservations are often entered not to avoid constitutional difficulties, but to preserve U.S. law as it is.³⁶ He is especially critical of federalism understandings, arguing that there "are no significant 'state's rights' limitations on the treaty power,"³⁷ and of non-self-execution declarations, which in his opinion "serve to immunize the United States from external judgment,"³⁸ and may be unconstitutional, given that "Article VI of the Constitution provides expressly for lawmaking by treaty: treaties are declared to be the supreme law of the land."³⁹ My

32. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399, 400-01 (2000).

33. *Id.* at 401.

34. *Id.*

35. *Id.* at 459.

36. See Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," 89 AM. J. INT'L. L. 341, 342 (1995).

37. *Id.* at 345.

38. *Id.* at 346.

39. *Id.* (But for a very forceful response to Henkin, see generally John C. Yoo, *Globalism and*

own observation is that at least in part as a result of RUDs, even the Civil Covenant does not play a meaningful role in American litigation.

RUDs and shamefully unsigned treaties apart, it is not the case that our country has abandoned the use of the concept of international human rights. Indeed, as Kenneth Cmiel has noted, Congress passed a series of statutes in the early 1970s that required monitoring of the adherence of other countries to human rights norms as a condition for U.S. military and financial foreign aid.⁴⁰ Since then, we have increased the number of such statutes, and since 1977 the State Department has annually issued *Country Reports on Human Rights Practices* to permit judgments to be made on the eligibility of listed countries to receive U.S. aid. By 2002, the State Department was reporting on 196 countries, including many not being considered for aid. In 1976, Congress legislated the creation of a Coordinator of Human Rights (later upgraded to Assistant Secretary) in the State Department, and added a Senior Advisor for Women's Rights in 1994. We also regularly (at least rhetorically) condition our international economic policy to human foreign human rights compliance – whether to grant Most Favored Nation trade status to China or to agree to its admission to the World Trade Organization, for example. But when domestic or international human rights nongovernmental organizations monitor our compliance with human rights norms, the U.S. government response is usually one of outrage. Our constitutional tradition has conditioned us to believe that our historic rights and norms are sufficient and defensible in the face of external critique.

2. CUSTOMARY INTERNATIONAL LAW

Are there other legal bases for U.S. participation in the international human rights system? One alternative to the treaty mechanism would be for the United States to accept as domestically enforceable the relevant customary international law — that portion of international law that does not derive from treaties or formal agreements. But here, too, the United States has been reluctant to commit itself to international human rights.

The U.S. Supreme Court announced as long ago as 1900, in *The Paquete Habana*,⁴¹ that customary international law is “part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are

the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 COLUM. L. REV. 1955 (1999)).

40. Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, 86 J. AM. HIST. 1231, 1233-35 (1999).

41. 175 U.S. 677 (1900).

duly presented for their determination.”⁴² This is a strong affirmation of the immediate applicability of customary international law to domestic adjudication that seems to authorize the federal courts to act:

For this purpose, where there is no treaty, and no controlling executive or legislative act or decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these to the works of jurists and commentators. . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trust in or evidence of what the law actually is.⁴³

There have been, now and then, other similar statements from the Court. Well before *The Paquete Habana*, in *Murray v. Schooner Charming Betsy*,⁴⁴ Chief Justice John Marshall wrote, “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”⁴⁵ In 1980, in *Filartiga v. Pena-Irala*,⁴⁶ Judge Irving Kaufman of the Second Circuit, having examined the Universal Declaration of Human Rights and other international instruments, followed *Paquete Habana* in determining that evolving principles of customary international law had declared torture to be a violation of human rights.⁴⁷

In a contemporaneous case, Pedro Rodriguez Fernandez, a Cuban immigrant in the 1980 Mariel “freedom flotilla” to the United States, challenged an Immigration and Naturalization Service order mandating his indefinite detainment and deportation on the grounds that he had previously been convicted of a crime in Cuba. He based his claim on the Eighth Amendment Cruel and Unusual Punishment Clause and the Fifth Amendment Due Process Clause.⁴⁸ The federal District Court of Kansas ordered the government to free Rodriguez Fernandez on the grounds that his indeterminate imprisonment constituted “arbitrary detention” and was a “violation of customary international law.”⁴⁹ The Court reasoned that repeated international agreements, while initially non-binding domestically, ultimately become binding as customary international law. Therefore, if a particular violation, such as Rodriguez Fernandez’s detention, “is found to be of mutual, and not merely of several, concern among nations,” it can be “judicially remedial as a viola-

42. *Id.* at 700.

43. Robert J. Martineau, Jr., *Interpreting the Constitution: The Use of International Human Rights Norms*, 5 HUM. RTS. Q. 87, 96 (1983).

44. 6 U.S. (2 Cranch) 64 (1804).

45. *Id.* at 118.

46. 630 F.2d 876 (2d Cir. 1980).

47. Martineau, *supra* note 43, at 96-97.

48. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 789 (D. Kan. 1980).

49. *Id.* at 800.

tion of international law.”⁵⁰

Subsequently, the Tenth Circuit Court of Appeals interpreted the statutes in question in a manner that required Rodriguez Fernandez’s release.⁵¹ In dicta, the judges also considered the constitutional question of whether his release was required by the due process protections afforded under the Fifth Amendment, considering principles of international law in the process: “It seems proper then to consider international law principles for notions of fairness as to the propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.”⁵² On these grounds, the Tenth Circuit concluded that Rodriguez Fernandez would have been entitled to release, as this would be “consistent with accepted international law principles that individuals are to be free from arbitrary imprisonment,”⁵³ as well as with “the statutory treatment of deportable resident aliens and with the constitutional principles . . . [of due process].”⁵⁴ While the District Court and the Court of Appeals reached the same result through a consideration of customary international law, the District Court employed a binding approach, whereas the Court of Appeals used a persuasive one.

There is little recent federal case law to suggest that either has gained widespread acceptance in U.S. courts. There are, however, some signs that federal courts are beginning to take foreign judicial opinions more seriously than in the past. In his dissenting opinion of the denial of certiorari in *Knight v. Florida*,⁵⁵ Justice Breyer considered the practice of foreign courts with respect to certain death penalty cases as persuasive authority, arguing that the Supreme Court “has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”⁵⁶ Such opinions, he contended, are “useful even though not binding.”⁵⁷ Taking a more mainstream approach, Justice Thomas dismissed Breyer’s analysis out of hand, noting, “Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the

50. *Id.* at 798.

51. *Fernandez v. Wilkinson*, 654 F.2d. 1382 (10th Cir. 1981).

52. *Id.* at 1388.

53. *Id.* at 1390.

54. *Id.*

55. 528 U.S. 990 (1999) (Breyer, J., dissenting).

56. *Id.* at 997.

57. *Id.* at 998.

Supreme Court of India, or the Privy Council.”⁵⁸

In a footnote in *Atkins v. Virginia*,⁵⁹ Justice Stevens cited a European Union amicus curiae brief as evidence that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁶⁰ Stevens’ use of international opinion provoked Chief Justice Rehnquist to respond that he failed “to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination,”⁶¹ given that the Court has “explicitly rejected the idea that the sentencing practices of other countries could ‘serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people’”⁶² More colorfully, Justice Scalia asserted, “But the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go it its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls. I agree with the Chief Justice that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”⁶³

Scalia then repeated his previous conviction. “We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”⁶⁴

Recently, Justice Kennedy’s notable opinion in *Lawrence v. Texas*⁶⁵ cited a decision of the European Court of Human Rights in support of his position rejecting the precedent established in *Bowers v. Hardwick*.⁶⁶

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has

58. *Id.* at 990 (Thomas, J., concurring).

59. 536 U.S. 304 (2002).

60. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

61. *Id.* at 324-25 (Rehnquist, J., dissenting).

62. *Id.* at 325 (citing *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989)).

63. *Id.* at 347-48 (Scalia, J., dissenting).

64. *Id.* at 348 (citing Justice Scalia’s dissent in *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988)).

65. 123 S. Ct. 2472, 2483 (2003).

66. 478 U.S. 186 (1986).

followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. . . . Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.⁶⁷

In his dissent, Justice Scalia refers to Canadian judicial legalization of homosexual marriage in rebuttal of Kennedy's assertion that it will not happen in the United States.⁶⁸ While it is conceivable that the judiciary may become more open to considerations of foreign values through analyses of customary international law, the courts remain strongly opposed to the citation of foreign law in the area of human rights. Our current legal climate is nowhere near a point at which the courts would accept such law as dispositive.

3. HOW DID WE GET HERE?

The legacy of the twentieth century is that we in the United States have mainly a tenuous and formalistic relationship to the international human rights system. To see why this is so, apart from ordinary politics, we must turn to the underlying premises and traditions of American constitutionalism. Our continuing reluctance to participate in the international human rights regime is not primarily the result of U.S. foreign policy isolationism, xenophobia or imperialistic hubris, though all of these elements have played a role. I believe that our dilemma runs much deeper and has, alas, more respectable constitutionalist roots.

The first aspect of this dilemma is our peculiarly strong textualist constitutional tradition. In the 1780s, the United States produced two of the world's first written national constitutions in the Articles of Confederation (1771-1781) and the Constitution of the United States (1787-1788), but our earlier colonial tradition also had rested heavily on authoritative texts: the great British constitutional texts and the several colonial charters. The irony is, of course, that American constitutional textualism developed with the nurturing of the world's oldest and most important tradition of unwritten constitutionalism. Our present governing document was adopted in 1787 and it has barely been changed during the past two centuries. This is not to say that the meanings given to the remarkably small number of words in the Constitution have not substantially changed over time. Whatever our politics or ideology, however, Americans seek desperately to justify our beliefs and actions by reference to the Constitution's text. It is not going too far to say that we have nearly sacralized both the constitutional text and the Bill of Rights; the original copy stored in the National Archives Building in

67. *Lawrence*, 123 S.Ct. at 2483.

68. *Id.* at 2497.

Washington, D.C., is protected by gas in a chamber that can quickly be lowered into a disaster-resistant tomb!

Historian Eric Hobsbawm recently attributed "the deliberate resistance to change of American public institutions"⁶⁹ to our textual constitutional tradition: "Forced into the straitjacket of an 18th century Constitution reinforced by two centuries of Talmudic exegesis by lawyers, the theologians of the republic, the institutions of the U.S.A. are far more frozen into immobility than those of almost all other states."⁷⁰

Moreover, we are not only committed to a brief and somewhat cryptic text, but we have submitted ourselves to the primacy of judicial interpretation of that text. Louis Henkin noted that from the earliest days of Chief Justice John Marshall's assertion of judicial control of constitutional interpretation, "[t]he text became all; what was written is the effective constitution. The Justices . . . felt constrained to look only to the text; what was not there was excluded."⁷¹ So we have a short, long-standing, judicially interpreted text. The text, one must also note, has seldom been amended, so restrictive were the provisions of Article V specifying the amendment process. None of this had to be so, but it is the constitutional tradition we have built, sustained and accepted.

I am not, however, trying to make an originalist argument. Although we have barely changed the constitutional text, we have of course introduced many innovations by way of judicial interpretation and acquiescence to novel changes in practice. There is an obvious distinction to be made between our essential constitutionalism (of which textualism is an integral part) and our constitutional tradition — as a matter of contingent fact, the way things constitutional turn out at a given point in time. Our constitutional tradition has witnessed extraordinary (and totally extra-textual) changes in relations between the states and the federal government (the Commerce Clause), between the executive and the legislature (the War Powers), and in the creation of wholly new processes and entities of government (administrative law and the Air Force), to name just a few. Constitutional practice changes, and with it the way the republic governs itself must change. There is no logical reason American constitutional tradition could not embrace international human rights ideals — no built-in structural resistance exists. But in fact, the tradition has failed us when it comes to human rights.

Thus, I simply want to suggest that our textualism is a sort of anchor to windward, inhibiting innovation, especially when constitu-

69. Eric Hobsbawm, *Only in America*, CHRON. OF HIGHER EDUC., July 4, 2003, at B9.

70. *Id.*

71. LOUIS HENKIN, *THE AGE OF RIGHTS* 90, n.7 (1990) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

tional changes trigger atavistic political responses. Textualism impels us to question, and sometimes to challenge, innovations that might otherwise be much easier to accept. The textualist tradition is more instinctive than rational, and makes it very hard to gain constitutional acceptance for ideas and practices that are rooted neither in the text nor found in our lived traditions. Insofar as human rights are concerned, textualism interacts with both Washingtonian fears of "foreign entanglement" and Anti-Federalist resistance to the aggrandizement of the government in Washington at the time of the Constitution's ratification.

The second element in the dilemma of American constitutionalism has been its close association with popular sovereignty. The United States may not have invented modern constitutionalism (although, as I have argued elsewhere, I think we did), but we surely innovated the formal relationship between constitutionalism and popular sovereignty. Here the central idea was that of ratification. In the American tradition, we rigidly separate the functions of legislation and constitution-making, as opposed to the legislative constitution-making approaches of most contemporary parliamentary/civil law countries.⁷² The American system requires specially elected bodies to propose constitutional texts, and either separate ratifying bodies or submission of the texts to the electorate for approval.

As Gordon Wood has demonstrated in his *Creation of the American Republic 1776-1787*, a radical theory of the derivation of the Constitution directly from the sovereign people was necessary to defend the politically contrived Constitution from Anti-Federalist charges that an anti-populist convention had stolen government from the people.⁷³ Federalist writers like James Wilson, speaking in the Pennsylvania Ratifying Convention, made the point explicit, arguing that the legitimate source of power did not come from state governments, "for in truth, it remains and flourishes with the people."⁷⁴ He contended that the source of legitimate power ". . . resides in the PEOPLE, as the fountain of government."⁷⁵ "Who will undertake to say as a state officer that the people may not give to the general government what powers and for what purposes they please? How comes it . . . that these State governments dictate to their superiors? – to the majesty of the people?"⁷⁶

Despite the fact that the people (as opposed to the judiciary) have been so little involved in formal constitution-making in modern Ameri-

72. Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 LAW & CONTEMP. PROBS. 223, 224-25 (2002).

73. GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 344-89 (1998).

74. *Id.* at 530-31.

75. *Id.* (emphasis in original).

76. *Id.* at 531.

can history, the historic Federalist sense of the tight fit between popular sovereignty and constitutional validity makes it hard for Americans to acknowledge the constitutional legitimacy of even the most admirable foreign constitutional institutions and norms. We simply do not accept that the United Nations or any other international body embodies the will of the American people sufficiently for it to establish rules enforceable in American courts. We are all Brickerites, to this extent, especially wary of the possibility that exogenous norms will be bootstrapped into the domestic order, by treaty, executive agreement, or otherwise. This is an integral part of the American constitutional personality that is increasingly in tension with the globalism of higher values. For Americans, international human rights, as they might be assimilated into our Constitution, threaten the creation of a disturbing democratic deficit – which is really to put Senator Bricker’s basic intuition into polite language. For most Americans, the adoption of such important values (at least insofar as they are new values) requires a formal constitutional act invoking popular sovereignty. We do, after all, have an available constitutional mechanism to support international human rights. But, effective constitutionalism anywhere depends on the continuing support of the people for its underlying values. Whether in the United States such support for the broadest forms of universal human rights exists or can be created through politics or programs of public education is a separate question that would need to be investigated in any fuller discussion of this problem. It is hard to believe that such support exists at the present moment.

The third factor in the dilemma of U.S. constitutionalism that makes it difficult for Americans to buy into the international norms is our sharply defined and somewhat idiosyncratic rights tradition. The American nation emerged out of a struggle for “the rights of Englishmen,”⁷⁷ and it briefly articulated its understanding of rights as natural rights in the Preamble to the Declaration of Independence. But, much more significantly, as Gerald Stourzh has recently pointed out, the Americans innovated by “*constitutionalizing* the rights of persons.” This was a dual process:

On the one hand, natural rights were reduced, if one may put it this way, to the level of constitutional rights – what German authors have called *die Positivierung des Naturrechts* (the positivizing of natural law). . . . On the other hand, the process of “constitutionalizing” individual rights also included the raising of various rights of English

77. Gerald Stourzh, *Liberal Democracy as a Culture of Rights: England, the United States and Continental Europe*, in BRIDGING THE ATLANTIC: THE QUESTION OF AMERICAN EXCEPTIONALISM IN PERSPECTIVE 15-16 (Elisabeth Glaser & Hermann Wellenreuther eds., 2002).

common law or parliamentary origin, particularly procedural rights, to the level of constitutional rights.⁷⁸

In other words, by the time we adopted the Bill of Rights in 1791, we had narrowed our rights orientation to that narrow set of rights explicitly written into the first amendments to the Constitution.

The process of constitutionalization limits our conception of rights to those listed in, or construed from, the Bill of Rights, which are almost entirely negative in character. The problem after the Revolution, after all, was to protect the rights of Englishmen from incursions by our own government, and the Bill of Rights was primarily aimed at preventing governmental abuse of the rights of citizens. To be sure, some rights are stated positively (the free exercise of religion, freedom of speech and the press, and the right to bear arms), but the form of each guarantee is one against the government. For Americans, the Bill of Rights says to the state, "Thou shall not" – or, more specifically – "Congress shall make no law. . . ." And of course the mysterious Ninth Amendment assures us (as it was intended to assure the Anti-Federalists) that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁷⁹ So while in principle the first eight amendments do not claim to be exclusive or exhaustive, in reality American constitutional parsimoniousness and textuality have not admitted of the judicial creation of numerous new constitutional rights. Even the Reconstruction Amendments, and in particular the Fourteenth Amendment, have not introduced many broad new rights, and none that is a positive right. As I argued some years ago, the guarantee of "equal protection" of the laws is a far cry from a mandate of "equality," whereas normative equality undergirds the structure of much of international human rights law.⁸⁰

The distinctiveness and limitations of our negative rights tradition did not become fully apparent until a half-century ago, when the beginnings of the end of the old American racial order and the emergence of a limited welfare state brought with them demands for positive economic and social rights. The quasi-egalitarian impact of the Warren Court's ruling in *Brown v. Board of Education*⁸¹ aroused hopes in many (and fears in many others) that its *ratio decidendi* would be extended far beyond race, and at least in the 1960s many new *Brown*-based rights did emerge. But the rights revolution, seen in retrospect, was basically a strong movement toward civil rights, with scant impact on social and,

78. *Id.* at 27.

79. U.S. CONST. amend. IX.

80. Stanley N. Katz, *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J. AM. HIST. 747 (1988).

81. 347 U.S. 483 (1954).

especially, economic rights. Progress was made in those areas through legislation, but there is in the United States a big constitutional difference between statutory entitlement programs and rights-based programs. For the past thirty years, the Supreme Court has been moving in directions that are hardly suggestive of the creation of even modest versions of the social or economic rights that are idealized in some of the most important international human rights agreements.

It is perhaps worth noting at this point that a central ambiguity has historically characterized the American rights tradition. This was originally revealed in the paradox of the slaveholder Thomas Jefferson and the Continental Congress proclaiming the universality of the rights of man in the Declaration of Independence. The ambiguity was then negatively written into the text of the Constitution through the several provisions taking slavery into account (and thus giving slavery constitutional status) in which the word "slave" nowhere appears. Stourzh has observed, "[T]he culture of rights in the United States draws its peculiar intensity and poignancy from the fact that in no other liberal democracy . . . have the affirmation of human rights and their denial been as closely adjacent to each other."⁸² We have subsequently had to be careful not to claim too much for the entrenchment of rights.

Now, of course, there are substantive reasons quite apart from our constitutional tradition that the United States has been, at best, reluctant to create positive rights – our weak state tradition, our historic antagonism toward socialism, our tradition of liberal individualism, and so forth. But these all move in the direction of middle of the road liberal economic democracy, a tendency that was strengthened dramatically during the Cold War. Franklin Delano Roosevelt may have hoped to constitutionalize the New Deal when he included "Freedom from Want" as one of the Four Freedoms, but despite Mrs. Roosevelt's tireless effort to include it in the U.N. human rights documents, the principle cannot seriously be considered a part of our constitutional tradition.

The constitutional version of the Cold War was a conflict between the forces of civil and political rights and those of social and economic rights. We in the West argued that if free market-based democracies ensured political and civil rights, they would then move in the direction of a prosperity that would benefit all sectors of society. The communists, on the other hand, argued that it would only be if the state could guarantee such rights as those of jobs, housing and health care that a decent society could be created. "You can't eat votes," we were told. Apart from Cuba, there are few places where the communist constitutional claim is still maintained, but it has long been the case that the

82. Stourzh, *supra* note 78, at 29.

underdeveloped and postcolonial world has accepted the primacy of positive, social and economic rights. The point here is simply that, to American ears, the International Covenant on Economic, Social and Cultural Rights still sounds dangerously similar to the Soviet position on rights, however widely supported the position now may be. We say they are the same old social and economic rights, and we say "to hell with them." This position is, for better or worse, as American as apple pie, and it constitutes an independent source of the U.S. human rights dilemma. To be fair, it is sometimes the case that American rights practices are superior – our legally enforceable norms are stronger than their international human rights analogues. But it may also be fair to say that Americans are particularly prone to "rights ethnocentricity." We tend to think that our historic conception of rights is the only valid conception, or at least that it is the best approach to constitutional rights. This is not likely to change anytime soon.

4. WHERE ARE WE GOING?

But some (and I have in mind Louis Henkin in his fine volume *The Age of Rights*)⁸³ would argue that I take too narrow and limited a view of the American rights tradition. Henkin would stress not only that the Bill of Rights is, by its own terms, not limited to the rights expressly enumerated therein, but that we have a prior and more important rights tradition in the Declaration of Independence. Henkin makes the exceptionally broad claim that the "ideas declared by Jefferson in 1776 constitute . . . the theory of American constitutionalism."⁸⁴

Though we think of our Constitution as Madisonian (and in important respects Hamiltonian), our idea of rights is Jeffersonian: The idea of rights articulated in the Declaration of Independence is reflected in the constitutional text. But the jurisprudence we have spun out of that text has lagged behind and diverged from Jeffersonian principles. In the growth of that jurisprudence, text and canonical exegesis have dominated, but theory has been at best assumed, often neglected or abandoned. The reasons for the divergence of doctrine from theory are complex. I cite two: We became committed to constitutional text and to the judicial remedy for monitoring it; and, as regards rights, the text was – is – deficient.⁸⁵

As you have seen, I agree with Henkin's analysis of the problem but not with his solution for it, since it carries the idea of Jeffersonian constitutionalism far beyond anything Jefferson ever said and has no

83. LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

84. *Id.* at 84.

85. *Id.* at 90.

roots in the historical American experience. Henkin imagines a remarkable Jeffersonian constitutional world:

For Jefferson, [however], the social compact was a contract among all persons constituting the people, and between each person and the people, to respect each other's rights and to create institutions to secure those rights; the compact also includes the conditions that govern the government to assure that it respects our rights. . . . A complete Jeffersonian constitution would have included an agreement among the people to respect each other's rights, including their equality; an agreement that the government to be created would respect those rights, including equality; an agreement that not only authorizes but requires government to protect every person from actions by his or her neighbor as well as from official actions that deny individual rights, including equality.⁸⁶

Henkin concludes that the Bill of Rights contains all the Jeffersonian rights save equality (a biggie, I might note), though he feels sure that the commanding Jeffersonian conception of the social compact does not allow for the welfare state. At this point, I lose Henkin completely, but it is clear that the reason he is driven to such historical broad constructionism is that he cannot find positive rights anywhere else in our constitutional tradition. My argument is that he cannot find them because they are not yet there.

And thus concludeth the sermon. I have tried to argue that we should not be surprised that the United States has been the most reluctant of the post-industrial democracies to participate in the international human rights regime. Our Constitution is virtually unamendable. Our rights tradition is mostly text-based, negative in character and limited to civil and political rights. But even our undoubted commitment to civil and political rights cannot offset our attachment to popular constitutional sovereignty. Henkin argues that this need not be an impediment to American participation in the international system:

Necessarily, however, the idea of rights reflected in the instruments [of international human rights], the particular rights recognized, and the consequent responsibilities for political societies, imply particular political ideas and moral principles. International human rights does not hint at any theory of social contract, but it is committed to popular sovereignty. "The will of the people shall be the basis of the authority of government" and is to "be expressed in periodic and genuine elections which shall be by universal and equal suffrage."⁸⁷

Logically, Henkin is correct, but I fear that he underestimates the vibrancy of American constitutional particularism.

86. *Id.* at 95.

87. *Id.* at 7 (*quoting* U.N. Charter art. 21, para. 3).

Our dilemma is that, by our own lights, we are too thoroughly constitutionalist (in the American way) to make international human rights a matter of domestic jurisdiction. I recognize that there are less admirable reasons why we hold ourselves apart. But if we are to sign on more fully to international human rights, we will have to rethink and reinvent some basic elements of our constitutional legacy and derive new strategies for constitutional action. More important, we will have to struggle to build a domestic political constituency in favor of constitutionalizing international human rights norms that satisfies American popular sovereignty sensibilities, unless one thinks that a sufficiently powerful free-standing political human rights constituency can be built to somehow obviate the constitutional barriers. For the moment, I am not optimistic that we are up to such challenges.